

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTHA STEWART	:	DETERMINATION
	:	DTA NO. 816263
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1991 and 1992.	:	

Petitioner, Martha Stewart, 10 Saugatuck Avenue, Westport, Connecticut 06880, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1991 and 1992.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 29 and 30, 1998 at 9:15 A.M., with all briefs to be submitted by March 19, 1999. Subsequently, the Division of Taxation requested, and was granted, the opportunity to file a sur-reply, due on April 15, 1999. Petitioner's reply to the sur-reply was due on April 30, 1999, which date began the six-month period for the issuance of this determination. The six-month period was extended for an additional three months, pursuant to Tax Appeals Tribunal Rules of Practice and Procedure § 3000.15(e)(1). Petitioner appeared by Arthur Andersen LLP (Kenneth T. Zemsky, Esq., Michael H. Goldsmith, Esq. and Marji L. Gordon-Brown, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Kevin R. Law, Esq. and Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the best evidence rule disqualifies the auditor's "Schedule of Days In & Out of New York" from being considered in rendering a determination in this matter.

II. Whether petitioner maintained a permanent place of abode and spent more than 183 days in New York State during 1992 and was therefore taxable as a New York State resident individual.

III. Whether petitioner was carrying on a trade or business in New York State or the City of New York during 1991 such that the income from such trade or business was subject to taxation by the State or City.

IV. Whether penalties imposed pursuant to Tax Law § 685(b), (i) and (p) should be sustained.

FINDINGS OF FACT

1. On October 6, 1997, the Division of Taxation ("Division") issued to petitioner, Martha Stewart, a Notice of Deficiency (Assessment Identification Number L-014152527-8) asserting tax due of \$221,677.82, plus penalties and interest, for the years 1991 and 1992.

2. Petitioner, Martha Stewart, at the time a domiciliary of Connecticut, filed New York State nonresident personal income tax returns (Form IT-203) and City of New York nonresident earnings tax returns (Form NYC-203) for the years 1991 and 1992. On her returns, petitioner indicated her residence to be 48 South Turkey Hill Road, Westport, Connecticut 06880. The Division commenced an audit of these years to verify the accuracy of petitioner's filings for allocation and residency purposes.

3. The audit was commenced by the Division by sending a questionnaire to petitioner on May 18, 1994. The questionnaire was completed by Margaret Christiansen, petitioner's business manager, with the assistance of Peter Weitsen, a partner in the accounting firm of Mendlowitz, Weitsen, petitioner's representative at the time of the commencement of the audit. The questionnaire was signed by Ms. Stewart, notarized and returned to the Division.

4. On the questionnaire, petitioner indicated that she owned a "summer home" at 58 Lily Pond Lane, East Hampton, New York 11937. Ms. Stewart stated that she first occupied this dwelling in East Hampton during the summer of 1991 and continued to maintain it during 1992. Ms. Stewart also indicated that certain of her belongings and furniture that had been purchased for the East Hampton residence remained at the residence during the years at issue.

5. Following the receipt of the completed questionnaire, the auditor requested, on October 7, 1994, that petitioner's representatives provide a day-by-day schedule of Ms. Stewart's whereabouts for the years at issue. The auditor suggested that the schedule be based upon personal or business diaries, credit card receipts, checking accounts maintained in New York and Connecticut, travel records, business expense records, frequent flyer records, telephone invoices from New York and Connecticut and limousine or driver records. Due to the immense amount of documentation necessary to provide a day-to-day schedule of Ms. Stewart's whereabouts for the years at issue, petitioner's representative requested that a test period audit be done. In a letter dated December 14, 1994 addressed to the representative, the auditor agreed to do a one-year audit and requested the records for 1992.

6. Petitioner provided the auditor with limousine invoices, expense reports and Ms. Stewart's itineraries for the year 1992 which were reviewed in an attempt to verify the daily schedule of petitioner. These records were not complete nor were explanations of the records

supplied by petitioner's representatives. The auditor did not make copies of these source documents nor were copies provided to the auditor. Using the source documentation provided by petitioner, the auditor created a computer generated "Schedule of Days In & Out of New York" which indicated for each day where petitioner claimed to have been, the days in dispute, where the auditor claimed petitioner to have been, the source documentation used by the auditor to reach his conclusion and the additional days in New York over that claimed by petitioner.

The auditor concluded that petitioner was in New York 184 days during the year 1992 and there were 45 additional days which were classified as unknown. In creating his schedule, the auditor accepted petitioner's claim that she was in Connecticut on certain holidays and on weekends, absent evidence to the contrary.

7. During the hearing petitioner established that some of the documentation presented to the auditor could not always be relied upon to accurately determine her whereabouts during 1992. According to Ms. Stewart and her main limousine driver, Lawrence Kennedy, the limousine invoices indicate an amount charged for the time of the driver and a destination, his meals, parking fees, tolls and a tip. However, although there were times that petitioner was driven to the location indicated on the invoice, there were other occasions that the driver drove other individuals in petitioner's automobiles, that the driver drove props for various photography shoots or the driver was paid when petitioner canceled a reserved ride. In summary, the limousine invoices indicate only that petitioner was charged for a ride to a particular location, but not the purpose of the ride or who was in the vehicle.

The expense reports or credit card receipts were also used by the auditor to establish petitioner's whereabouts for the year 1992. Only those receipts that contained petitioner's signature were used by the auditor. If the receipt did not contain a signature, it was excluded.

However, during the hearing petitioner established that certain credit cards were on file with particular stores, and orders were often placed over the telephone or were used by other individuals who signed petitioner's name. Thus, the credit card receipts could not be relied upon to determine definitively the whereabouts of petitioner on any given day.

Petitioner's daily itineraries indicated her agenda for a particular day. On more than one occasion the itineraries showed that petitioner would split her days between several locations, such as Connecticut, East Hampton, New York and New York City. It was established at hearing, however, that petitioner's daily activities as indicated on the itineraries were sometimes changed, although the agenda as written on the itinerary would not be changed.

8. During the audit the question arose as to whether petitioner maintained a permanent place of abode in New York City as the auditor discovered an itinerary which indicated that petitioner owned an apartment there. As this was disputed by petitioner's representatives at the time, an examination was conducted to determine the condition of the apartment. Based upon a visit to, and an inspection of, the apartment, and a conversation with the building superintendent, the auditor determined that the apartment would not have constituted a permanent place of abode in New York City because it was uninhabitable during the audit period as it was under construction. The prior representatives never raised the issue during the audit that petitioner's "summer home" located at 58 Lily Pond Lane in East Hampton, New York did not constitute a permanent place of abode.

9. During the year 1996, petitioner hired new representatives to represent her in this matter. The new representatives brought up for the first time the issue of whether the East Hampton summer home would constitute a permanent place of abode for the years under audit. The current representatives provided documentation to substantiate that the East Hampton

property underwent substantial renovation beginning in early 1990 through the middle of 1991. A schedule entitled "Summary of East Hampton Renovation Expenses Ben Krupinski Builder" which was provided to the auditor by petitioner's representatives indicated that petitioner incurred \$1,304,296.86 in expenses in renovating the summer home and adjoining cottage during the period March 1990 through April 1991. The letter accompanying the schedule stated that due to the extensive renovations that were being done, the home and cottage were not habitable during the years 1990, 1991 and 1992. Although requested by the auditor, the representatives did not provide any documentation supporting their claim that the home and cottage were uninhabitable in 1992 or additional information relating to the day count for 1992.

10. After reviewing the documentation provided and using an investigative aide to determine the habitability of the summer home and cottage, the auditor determined that the East Hampton home and cottage would not have constituted a permanent place of abode for 1990 and 1991, but did constitute a permanent place of abode in 1992. In reaching his conclusion, the auditor considered the lack of documentation concerning renovation costs in 1992, the certificate of occupancy issued by the Town of East Hampton in November 1991 and the Internal Revenue Service's adjustments during an audit wherein certain claimed business expenses relating to the East Hampton home were disallowed and treated as personal expenses. Ms. Stewart had agreed to this reclassification and had been notified by the Internal Revenue Service on February 12, 1996 that the case had been agreed upon and was being closed. Ms. Stewart never notified the Division of the Federal changes made. The auditor relayed his conclusions to petitioner's representatives and requested documentation to verify the wage and business allocations reported for the years 1990 and 1991 and information concerning the 45 days which the auditor

had classified as unknown. Petitioner's representatives informed the auditor that no such records existed.

11. Since no additional records were provided by petitioner, the auditor determined petitioner to be a statutory resident of New York State for 1992 as she maintained a permanent place of abode in New York (the East Hampton residence) in such year and spent, in the aggregate, more than 183 days in New York in such year. For 1991, based upon petitioner's known business activities and lacking any information as to how petitioner's wage and business income was allocated on her return, the auditor determined that a wage and business allocation was appropriate. Therefore, the auditor used an estimate of 65% to allocate business income to New York. The auditor also incorporated unreported final Federal audit changes into his audit adjustments. Finally, the auditor estimated a New York City earnings tax on nonresidents for 1991 and 1992 based on the auditor's finding that petitioner had a substantial working presence in New York City.

12. In that petitioner had failed to file a report of final Federal audit changes or notify the Division of such changes, the auditor imposed penalties pursuant to Tax Law § 685(i). Penalties were also imposed pursuant to Tax Law § 685(b) for the failure to retain the necessary records with regard to income allocation and residency issues and under Tax Law § 685(p) for the substantial understatement of petitioner's tax liability.

13. Petitioner executed three consents extending period of limitation for assessment of personal income tax, dated July 6, 1995, December 22, 1995 and December 6, 1996, which collectively extended the period of assessment for the years 1991 and 1992 to October 15, 1997.

14. On July 26, 1987, petitioner executed a License Agreement with the Kmart Corporation ("Kmart"), a Michigan corporation with its principal offices at 3100 West Big

Beaver, Troy, Michigan. Petitioner was hired by Kmart to design, critique, create and oversee the manufacture of a line of bedding and bath products. Related duties included being present at store openings, personal appearances and visiting manufacturers. All services provided to Kmart were rendered at its corporate headquarters in Troy, Michigan or various other locations outside New York. Petitioner received, in 1991 and 1992, a licensing fee, day rate and product royalties for her services. The license agreement provided, in relevant part, as follows:

- a. Kmart shall have the right to use the name, image, biographical material, professional theories and reputation of Stewart in connection with and Stewart shall actively participate in the promotion and imaging of Kmart in general . . . including, without limitation, through television, radio, print and other media campaigns, in-store videos, appearances and other presentations, and intra-company programs. . . .
- b. Stewart shall be available for no less than 30 and no more than 36 full “working days”(as hereinafter defined) in each annual period. . . .
- c. For purposes of this agreement, the phrase “working days” shall mean . . . those business days in which eight (8) or more hours [or] each aggregate of eight (8) hours in any other combination of days which are devoted exclusively to performance of services hereunder, including participating as a speaker, actress, model, advisor, consultant, author and meeting attendant/participant and travel exclusively for and at the request of Kmart. . . .
- d. . . . Stewart hereby grants to Kmart, and Kmart hereby accepts, subject to all of the terms and conditions of this Agreement, an exclusive license with the full right to sublicense to others the right to use the name and trademark “Martha Stewart”. . . throughout the world in connection with the manufacture, distribution and sale of each and all of those products sold in the Covered Departments.
- e. Stewart shall participate in all reasonable respects in connection with the development, conclusion and implementation of sublicensing projects, and the promotion of the subjects thereof. . . .
- f. The initial term of this Agreement shall commence as of July 1, 1987 and will continue for five (5) years through and including June 30, 1992. . . .
- g. Stewart shall furnish services in connection with the production of print advertisements, television and radio commercials and programs, video tape presentation and attendance at Kmart’s advertising agency conferences, press

conferences or parties or national sales, district managers or similar meetings wherein new Licensed Products or other operational programs are introduced or discussed. . . .

h. . . . Stewart shall . . . participate in personal appearances at its stores or at stores at which Licensed Products are being launched. . . . In addition, Stewart shall, upon Kmart's request, appear on national television or radio programs for purposes of promoting Kmart, its Covered Departments or the Licensed Products and acting as a spokeswoman.

15. Pursuant to an Agreement executed on July 13, 1989, petitioner was engaged by Clarkson N. Potter, Inc.¹, 225 Park Avenue South, New York, New York to create two books: Martha Stewart Gardening Book and New Old House. The layout work was done at the offices of Crown Publishing in New York City and Ms. Stewart came to the offices to check on the layouts, according to petitioner, a total of four times during the publication of these two books. Petitioner was involved in the creation, photography, and writing of these volumes. The subjects of each of these books, the garden and the renovated house, were located in Connecticut. Most of the work related to the books, including the writing, planting and care of the garden, renovation of the house and photography took place in Connecticut. Ms. Stewart either directly participated in these activities or supervised them. As compensation for her services, petitioner received a number of royalties and an advance to defray related expenses.

16. During the years in question, petitioner gave several lectures throughout the country for which she received compensation. None of these speaking engagements occurred in New York State.

Petitioner testified quite emphatically that she was not appearing on the Today Show in 1991. However, in the July/August 1991 and September/October 1991 issues of Martha Stewart

¹The publisher Clarkson Potter was formerly known as Crown Publishing, which later became a division of Random House. At the time of these agreements, Clarkson Potter was part of The Crown Publishing Group. Currently, it is owned by Bertlesmann.

Living, it was clearly stated that she was in fact appearing on the Today Show in 1991. This position was later recanted in her brief.

17. Time, Inc. Magazine Company (“Time”), Rockefeller Center, New York, New York, and petitioner entered into a Letter Agreement dated July 31, 1990 relating to the publication of two test issues of a national magazine entitled Martha Stewart Living. Under the agreement, Time was to publish the test issues with an option to publish more issues in the future and was to be solely responsible for distribution, promotion, circulation, advertising sales and related services. Following the publication of the two test issues in 1991, Time assigned its rights under the Letter Agreement to Time Publishing Ventures, Inc. (“TPV”) and six more issues were published in 1991 and 1992. In contemplation of the launch of the future magazines, Ms. Stewart entered into an agreement with TPV and continued to serve, on an independent contractor basis, as editor-in chief. Both Time and TPV paid a signing bonus, consulting fee for her services as editor-in-chief, a profit sharing compensation incentive and a bonus payment right in the magazine. In addition, during the period of time that petitioner served as editor-in-chief, Time and TPV paid an annual salary to Ms. Stewart’s personal consultant responsible for advising Ms. Stewart in connection with her various duties for the magazine. Petitioner provided general creative and editorial direction and was designated the editor-in-chief of the magazine. Ms. Stewart, along with the managing editor, had responsibility for providing the creative and editorial structure of the magazine. They worked together with the editorial staff to develop and implement the editorial content, policy and design of the magazine. The managing editor, art director and remaining staff were all situated in New York City at the offices of Time. Petitioner also worked closely with the managing editor to develop an editorial budget for each issue of the magazines and to present the budgets to the publisher, also situated in New York City. Ms.

Stewart was present at most of the photography shoots, which took place both within and without New York, and reviewed the layouts for the magazine at the New York City office as well as her home in Connecticut. As the office space provided by Time and TPV was limited, petitioner generally wrote and edited her articles at her office located in her home in Connecticut.

18. Pursuant to the letter agreement, Ms. Stewart granted to Time the right and license to use the name “Martha Stewart” (referred to in the agreements as the “Trademark”) worldwide in connection with the publication of the two test issues. The license included the right to use the Trademark in the title of the magazine and on materials related to the test issues, including advertising and promotional material. Under the Publishing and Service Agreement entered into with TPV, Ms. Stewart assigned and transferred to TPV all worldwide right, title and interest in the Trademark, together with the goodwill of the business associated therewith and the registration of the Trademark. Ms. Stewart also granted to TPV and its affiliates an exclusive worldwide license to use her name in connection with the publication of the magazine.

19. During 1991, petitioner received fees for appearing on the Today Show. The program was taped at NBC’s studios in New York City. In 1992, petitioner received a fee of \$1,138.00 for appearing on the Jay Leno Show in California.

20. Petitioner offered testimony that the East Hampton home was not habitable during the early months of 1992, that extensive construction was still going on during the year, that construction bills were being paid in March and April 1992 in the amount of approximately \$80,000.00 and that the house was repainted in February 1992 due to a photography shoot that occurred in January 1992. In addition, petitioner presented testimony that furniture was brought

in for the painting shoot, including an iron bed and chairs, that the kitchen was not finished and that other props were brought in at various times for different shoots in 1991 and 1992.

In contrast, the audit questionnaire signed by petitioner before a notary public stated that petitioner began occupying the East Hampton residence in the summer of 1991 and continued to maintain the residence during 1992. Ms. Christiansen testified that she completed the questionnaire with the assistance of petitioner's former representatives because she "had no idea how to fill the questionnaire out." However, she did consult with petitioner's prior representatives who were able to provide her with responses to the admittedly straightforward questions.

21. Although several witnesses testified that the East Hampton residence was uninhabitable in 1991 and 1992, documents submitted by petitioner seem to contradict this testimony. On the inside back cover of the book jacket of Martha Stewart's Gardening Month by Month, published in 1991, there is a brief biography of petitioner which states in part that "Mrs. Stewart lives in Connecticut and New York, and is presently creating a new garden on Long Island." The book jacket of her next book, published in 1992, Martha Stewart's New Old House, states that "Mrs. Stewart lives in Connecticut in a Federal farmhouse and on Long Island in a shingled Queen Anne-style house she has recently restored and renovated." The appearance of petitioner maintaining a house in East Hampton continues on page four of the November/December 1991 issue of the Martha Stewart Living magazine wherein petitioner, describing the article and the shoot of the East Hampton property pictured on page 55 of the magazine, states that:

My sister Laura was married on New Year's Eve in my parlor twelve years ago. It was that event that inspired us to create a holiday wedding for this issue, with my home, once again, as the setting. This time we used

my new home by the seashore, a shingled rambler with numerous mantels, polished fir floors, and white walls and woodwork.

From the pictures of the East Hampton residence shown therein, it appears that this property was habitable and furnished, and from the tone of petitioner's letter, in use as a residence.

22. Petitioner had cable television service installed through Cablevision in the East Hampton residence in July 1991. It was explained by petitioner that cable was necessary because a stereo and audiovisual system was being installed and cable was required to test the new system. However, petitioner subscribed to Cablevision's Rainbow package which included Family plus Cable, HBO, Showtime, Disney, MSG and Sports Channel.

23. In addition to the main dwelling of the East Hampton residence, there also exists on the property a three-bedroom cottage, with garage. According to an article appearing in the Spring 1991 issue of the Martha Stewart Living magazine, the cottage was owned by Alexis Stewart, petitioner's daughter. Accompanying the six-page article are numerous photographs which show the cottage to be well furnished and "lived-in." The cottage appears to be habitable and clearly had already been renovated by the time these photographs were taken. The article describes in some detail the efforts made by petitioner's daughter to obtain the various items which appear in the photographs and to decorate the cottage in general. As this article appeared in the Spring issue of 1991, it is clear that at this time the cottage had already been completely renovated and petitioner's daughter was residing in the house. This is significant because both petitioner and Ms. Christiansen testified that the renovations on the main house and the cottage were

completed at the same time. Thus, the house on the East Hampton property would also have been renovated by this time.

24. The use of the cottage by petitioner's daughter was also the subject of some conflicting testimony by petitioner and other witnesses presented by petitioner.

Petitioner and Ms. Gael Towey, creative director at Time, Inc. for the Martha Stewart Living magazine, testified that during 1991 petitioner's daughter stayed at the cottage, which would be consistent with the information contained in the Spring 1991 issue of Martha Stewart Living. However, petitioner also testified that during 1991 her daughter rented an apartment while she was in East Hampton and Ms. Christiansen testified that in 1991 petitioner's daughter did not live in the cottage because it was still under construction.

25. During the course of the hearing, petitioner presented the following documentation, information or arguments relating to specific days claimed to have been spent outside New York State and City:

March 1, 1992

Petitioner introduced into the record an invoice from Martha Stewart Entertaining to Kmart relating to an appearance by Ms. Stewart in Chicago on behalf of Kmart on March 1, 1992. In addition, there was introduced into the record an airline ticket for U.S. Air, Inc. between New York City (LaGuardia Airport) and Chicago on this date and an invoice from the limousine driver to Ms. Stewart for services rendered on this date to LaGuardia Airport.

April 10, 1992

Introduced into the record was a U.S. Air, Inc. airline ticket between LaGuardia Airport in New York City and Greensboro, North Carolina, leaving on April 9 and returning on April

10. Also introduced was an itinerary for Ms. Stewart for April 9 and 10, 1992 at the High Point Market in North Carolina and an invoice from Ms. Stewart's driver for these two dates.

April 17, 1992

Although petitioner did not submit any documentation, she claimed that because this was Good Friday, she must have spent this holiday in Connecticut. However, the Division correctly points out that in an article written by petitioner appearing in the December 1992/January 1993 issue of Martha Stewart Living, Ms. Stewart indicates that she no longer attends religious services, but instead considers family gatherings to be central holiday rituals.

May 9, 1992

An invoice from Martha Stewart to Random House indicates that an editor for the New Old House book had been driven to Westport, Connecticut on this date and returned to New York City the same day. On May 14, 1992, the limousine driver presented to petitioner an invoice indicating a round-trip fare to New York City to pick-up the editor in the morning and a second round trip fare to return the editor to New York City in the evening.

May 14, 1992

An invoice of this date from the limousine driver states that a reserved trip on this date had been canceled. No other documentation was submitted to establish where Ms. Stewart was on this date.

May 29, 1992

Petitioner claims to have been giving a tour at the 48 South Turkey Hill Road property in Connecticut. She relies on a daily itinerary which states that "Carolyn & Julie to take approx. 40 women through the gardens." The itinerary also states that "Larry pick up at 48 - To EH with Magazine props." In addition, there is a limousine invoice from Lawrence Kennedy to

Martha Stewart Living magazine for driving props to Long Island.

June 30, 1992

A daily itinerary, summary of business expenses, Continental Airlines ticket for a round trip fare between LaGuardia Airport and Cleveland, Ohio and an invoice from the limousine driver to Martha Stewart Living magazine indicate that petitioner was in Ohio for the day participating in a photography shoot. The limousine invoice also indicates that the driver left LaGuardia Airport for Long Island before returning to the airport in the evening.

July 2, 1992

An invoice from the limousine driver to Martha Stewart Living magazine indicates that on this date crew members were driven to New York City for the Today Show. The invoice further states that on the next day, the driver took Ms. Stewart to New York City for the same purpose.

September 11, 1992

An itinerary for September 10, 11 and 12, 1992 and a limousine invoice indicate that petitioner left for Houston, Texas on September 10 for a book signing session on September 11 and returned on September 12.

September 27, 1992

Two limousine invoices for this date indicate two separate trips to New York City. The purpose of the first trip as stated on the invoice was to pick up slides at the Martha Stewart Living offices in the Time Life Building. There is a notation on each of the invoices indicating that Martha Stewart did not make the trips.

October 15, 1992

A daily itinerary for this date indicates various activities surrounding the 48 South

Turkey Hill Road property. None of the activities, however, mention that petitioner would be participating.

November 8, 1992

An itinerary for November 7, 8 and 9, 1992 states that petitioner was to have lunch on Shelter Island, New York on November 8, 1992. However, on November 7, 1992, there is a notation to call and cancel the lunch on November 8.

November 24, 1992

An itinerary for “Wednesday, November 24, 1992” indicates that petitioner was to appear on the David Letterman Show in the evening. However, a mistake had been made on the date as Wednesday was the 25th of November, not the 24th. An invoice from Regency Limousine, Inc. shows the cancellation of the service for the 24th and a second limousine invoice shows the limousine service being acquired for the 25th. In addition, Martha Stewart Entertaining invoiced Random House for expenses incurred relating to her appearance on the David Letterman Show on November 25, 1992.

November 26, 1992

An invoice from Martha Stewart to Martha Stewart Living magazine states that petitioner was at the 48 South Turkey Hill Road property in Connecticut doing a live remote broadcast pertaining to the Thanksgiving holiday for the Today Show.

December 24, 1992

Although no documentation was offered, petitioner claims this to be a day spent in Connecticut as it was a holiday, Christmas Eve.

December 26-31, 1992

An invoice from Regency Limousine, Inc. indicates that petitioner was driven to

Newark Airport on December 26, 1992. A Summary of an American Express Corporate Card Account and the individual credit card slips show various purchases made by Ms. Stewart in the Caribbean Islands during this period. Petitioner testified that she “always went on vacation between Christmas and New Year’s to the islands.”

26. Through the testimony of Susan Magrino, publicity agent at Crown Publishing, and later, at the Susan Magrino Agency, Gael Towey, Margaret Christiansen, Lawrence Kennedy and herself, petitioner attempted to establish that she was not in New York State in excess of 183 days during 1992. Petitioner testified that she spent only five days in New York City for each issue of Martha Stewart Living to see the progress of the layouts, to proof the layout, to proofread and to make any changes. Ms. Towey testified that layouts were shipped to Connecticut. Ms. Christiansen testified that petitioner would occasionally go to New York City to look at the magazine layouts. According to Ms. Magrino, book signings took place in non-New York locations, such as Los Angeles, San Diego, Chicago, Dallas, Houston, Philadelphia and Boston. The testimony indicated that journalists were sent to petitioner’s home in Connecticut in order to interview Ms. Stewart, as that was where her base of operations was located. Furthermore, according to testimony, Ms. Stewart did not maintain an office in New York City and performed her consulting services in Connecticut. As for the Today Show, petitioner traveled to New York City once a month for live broadcasts and “post tapes.” Petitioner did not render any services for Kmart in New York during 1992 as there were no stores to visit during that year. Instead, most of the services rendered for Kmart occurred in Troy, Michigan.

As for Ms. Stewart’s personal life, she testified that most of her friends lived in Greenwich, Connecticut. She would sometimes, but not often, dine in New York City and she

never spent more than a day or two in East Hampton. The testimony of Ms. Stewart's business associates was that when they needed to contact her, which was often on a daily basis, they would telephone petitioner in Connecticut, sometimes reaching her and sometimes leaving a message on her answering machine.

CONCLUSIONS OF LAW

A. Petitioner is incorrect in her contention that the best evidence rule applies to the administrative proceedings of the Division of Tax Appeals. Petitioner wishes to exclude from consideration in this matter the schedule created by the auditor of Ms. Stewart's whereabouts because the Division did not have at the hearing the limousine invoices, expense reports and daily itineraries presented by petitioner to the auditor to establish her location during 1992.

Section 306 of the State Administrative Procedure Act states, in part:

1. Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts
2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference (State Administrative Procedure Act § 306 [1], [2]).

Section 3000.15(d) of the Tax Appeals Tribunal's Rules of Practice and Procedure, which addresses Administrative Hearings, states, in part:

- (d) Conduct of hearing Technical rules of evidence will be disregarded to the extent permitted by the decisions of the courts of this State, provided the evidence offered appears to be relevant and material to the issues (20 NYCRR 3000.15[d]).

As provided by the above referenced statute and regulation, there is no requirement that evidence submitted to an administrative law judge be an original copy (*see, Matter of Flanagan v. New York State Tax Commn.*, 154 AD2d 758, 546 NYS2d 205; *Matter of Sandrich Foods*,

Inc., Tax Appeals Tribunal, September 22, 1994: ***Matter of Murphy***, Tax Appeals Tribunal, March 17, 1994). The schedule created by the auditor was relevant and material to the issues involved, and was therefore properly made a part of the record in this matter. It is noted that the documentation which petitioner would require the Division to have in its possession is the documentation presented by petitioner to the auditor.

B. Pursuant to Tax Law § 605(b)(1)(B), any person who maintains a permanent place of abode in New York State, and spends in the aggregate more than 183 days in the state, is deemed a resident of the state for income tax purposes. The definition of “resident” for New York City income tax purposes, pursuant to the New York City Administrative Code § 11-1705(b), is identical to that for State income tax purposes given above, except for the substitution of the term “city” for “state.” This classification is significant because, while nonresidents are taxed only upon their New York source income (Tax Law § 631), residents are taxed upon their worldwide income (Tax Law § 612).

C. The first issue to be addressed is whether petitioner maintained a permanent place of abode in New York State during the year 1992. A “permanent place of abode” is defined as “a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer. . .” (20 NYCRR 105.20[e][1]). Additionally, the permanent place of abode must be maintained for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) (20 NYCRR 105.20[a][2]).

Petitioner offered testimony that the East Hampton home was not habitable during the early months of 1992, that extensive construction was still going on during the year (*see*, Finding of Fact “20”).

In contrast, the audit questionnaire signed by petitioner before a notary public stated that petitioner began occupying the East Hampton residence in the summer of 1991 and continued to maintain the residence during 1992 (*see*, Finding of Fact “20”). In addition, petitioner herself signed the questionnaire and it must be assumed that a person of Ms. Stewart’s business savvy and hands-on approach to her business operations would review a document being forwarded to the Division which could substantially affect her tax liability.

Although several witnesses testified that the East Hampton residence was uninhabitable in 1991 and 1992, documents submitted by petitioner seem to contradict this testimony (*see*, Finding of Fact “21”).

Petitioner had cable television service installed through Cablevision in the East Hampton residence in July 1991. It was explained by petitioner that a stereo and audiovisual system was being installed and cable was necessary in order to test the new system. However, petitioner subscribed to Cablevision’s Rainbow package which included Family plus Cable, HBO, Showtime, Disney, MSG and Sports Channel. This degree of cable service appears to be more than that required to test a stereo and audiovisual system and is more consistent with an occupied residence, as well as being consistent with the replies to the audit questionnaire.

In addition to the main dwelling of the East Hampton residence, there also exists on the property a three-bedroom cottage, with garage (*see*, Finding of Fact “23”).

The use of the cottage by petitioner’s daughter was also the subject of some conflicting testimony by petitioner and other witnesses presented by petitioner (*see*, Finding of Fact “24”). Such conflicting testimony, both within the context of other testimony and documents in the record diminishes the credibility of the witnesses presented on behalf of petitioner as it relates to the issue of whether petitioner maintained a permanent place of abode for substantially all of

1992. Without the testimony of the witnesses, and considering the magazine articles, responses to the audit questionnaire, the certificate of occupancy, availability of the cottage and cable service hook-up in July 1991, it is determined that petitioner has failed to establish by clear and convincing evidence that she did not maintain a permanent place of abode in New York State for substantially all of 1992.

D. The next issue to be addressed is whether petitioner spent in excess of 183 days in New York State during the year 1992. The auditor was provided with limousine invoices, expense reports and daily itineraries of Ms. Stewart. The auditor used the documentation presented by petitioner and her representatives to conclude that Ms. Stewart was in New York State 184 days, with an additional 45 days considered unknown. With the unknown days added to the established New York State days, petitioner was considered a resident of the State .

Petitioner claims to have established that she was not in New York State for more than 183 days during the year 1992, (*see*, Finding of Fact “26”).

E. Petitioner introduced specific documentation and/or arguments relating to the following days which the auditor had classified as either New York State, New York City or “other” days on his “Schedule of Days In & Out of New York” (*see*, Finding of Fact “25”).

March 1, 1992

Petitioner introduced into the record an invoice from Martha Stewart Entertaining to Kmart relating to an appearance by Ms. Stewart in Chicago on behalf of Kmart for March 1, 1992, and an airline ticket for U.S. Air, Inc. between New York City (LaGuardia Airport) and Chicago on this date and an invoice from the limousine driver to Ms. Stewart for services rendered on this date to LaGuardia Airport. This documentation, taken together, is sufficient to establish that petitioner was absent from New York State on this date.

April 10, 1992

Introduced into the record was a U.S. Air, Inc. airline ticket between LaGuardia Airport in New York City and Greensboro, North Carolina, leaving on April 9 and returning on April 10, an itinerary for Ms. Stewart for April 9 and 10, 1992 at the High Point Market in North Carolina and an invoice from Ms. Stewart's driver for these two dates. When viewed in their entirety, the documentation establishes that petitioner was not in New York State on this date.

April 17, 1992

Although petitioner did not submit any documentation, she claimed that because this was Good Friday, she must have spent this holiday in Connecticut. However, the Division pointed out that in an article written by petitioner appearing in the December 1992/January 1993 issue of Martha Stewart Living, Ms Stewart indicates that she no longer attends religious services. However, consistent with the auditor's approach to consider holidays to have been spent at home, this day will be counted as a Connecticut day.

May 9, 1992

An invoice from Martha Stewart to Random House indicates that an editor for the New Old House book had been driven to Westport, Connecticut on this date and returned to New York City the same day. On May 14, 1992, the limousine driver presented to petitioner an invoice indicating a round-trip fare to New York City to pick-up the editor in the morning and a second round trip fare to return the editor to New York City in the evening. The documentation, when taken together, establishes petitioner's location on this date to be Connecticut.

May 14, 1992

An invoice of this date from the limousine driver states that a reserved trip to New York City on this date had been canceled. No other documentation was submitted to establish where Ms. Stewart was on this date. As no documentation was provided which establishes Ms. Stewart's whereabouts on this day, it remains an "unknown" day and therefore a New York day.

May 29, 1992

Petitioner claims to have been giving a tour at the 48 South Turkey Hill Road property in Connecticut. She relies on a daily itinerary which states that "Carolyn & Julie to take approx. 40 women through the gardens." The itinerary also states that "Larry pick up at 48 - To EH with Magazine props." In addition, there is a limousine invoice from Lawrence Kennedy to Martha Stewart Living magazine for driving props to Long Island. Petitioner has established that the limousine driver, Lawrence Kennedy, drove props to East Hampton on this day. However, she has failed to provide any documentation as to her location and this day must remain an "unknown" day.

June 30, 1992

A daily itinerary, summary of business expenses, Continental Airlines ticket for a round trip fare between LaGuardia Airport and Cleveland, Ohio and an invoice from the limousine driver to Martha Stewart Living magazine indicate that petitioner was in Ohio for the day participating in a photography shoot. The limousine invoice also indicates that the driver left LaGuardia Airport for Long Island before returning to the airport in the evening. Petitioner has established through the information provided that she was in Ohio, and this day is therefore no longer to be considered "in dispute" but is to be counted as a non-New York day.

July 2, 1992

An invoice from the limousine driver to Martha Stewart Living magazine indicates that on this date crew members were driven to New York City for the Today Show. The invoice further states that on the next day, the driver took Ms. Stewart to New York City for the same purpose. However, no documentation was provided as to Ms. Stewart's location on this day and it is therefore to be counted as a New York day.

September 11, 1992

An itinerary for September 10, 11 and 12, 1992 and a limousine invoice indicate that petitioner left for Houston, Texas on September 10 for a book signing session on September 11 and returned on September 12. The itinerary and limousine invoice, when taken together, establish Ms. Stewart to be in Texas on this day which is properly counted as a non New York day.

September 27, 1992

Two limousine invoices for this date indicate two separate trips to New York City. The purpose of the first trip as stated on the invoice was to pick up slides at the Martha Stewart Living offices in the Time Life Building. There is a notation on each of the invoices indicating that Martha Stewart did not make the trips. Petitioner has established through the invoices that Ms. Stewart was not taken to New York City by either of these two trips. Once again, however, petitioner has offered nothing to establish Ms. Stewart's location on this day and it is to be counted as a New York day.

October 15, 1992

A daily itinerary for this date indicates various activities surrounding the 48 South Turkey Hill Road property. None of the activities, however, mention that petitioner would be

participating. No documentation provided even remotely establishes Ms. Stewart's whereabouts and this day properly remains an "unknown" day and must be counted as a New York day.

November 8, 1992

An itinerary for November 7, 8 and 9, 1992 states that petitioner was to have lunch on Shelter Island, New York on November 8, 1992. However, on November 7, 1992, there is a notation to call and cancel the lunch on November 8. The documentation fails for two reasons: it is an itinerary which petitioner has established to be unreliable, and it does not provide any information as to Ms. Stewart's location on this day. It is counted as a New York day.

November 24, 1992

An itinerary for "Wednesday, November 24, 1992" indicates that petitioner was to appear on the David Letterman Show in the evening. However, a mistake had been made on the date as Wednesday was the 25th of November, not the 24th. An invoice from Regency Limousine, Inc. shows the cancellation of the service for the 24th and a second limousine invoice shows the limousine service being acquired for the 25th. In addition, Martha Stewart Entertaining invoiced Random House for expenses incurred relating to her appearance on the David Letterman Show on November 25, 1992. Once again, petitioner has failed to provide information as to her whereabouts on this day and it is to remain a New York day.

November 26, 1992

An invoice from Martha Stewart to Martha Stewart Living magazine states that petitioner was at the 48 South Turkey Hill Road property in Connecticut doing a live remote broadcast pertaining to the Thanksgiving holiday for the Today Show. This day is to be recalculated as a non-New York day as the invoice places Ms. Stewart in Connecticut.

December 24, 1992

Although no documentation was offered, petitioner claims this to be a day spent in Connecticut as it was a holiday, Christmas Eve. Consistent with the auditor's approach to consider Ms. Stewart in Connecticut on holidays, this day will be counted as a non-New York day.

December 26-31, 1992

An invoice from Regency Limousine, Inc. indicates that petitioner was driven to Newark Airport on December 26, 1992. A Summary of an American Express Corporate Card Account and the individual credit card slips show various purchases made by Ms. Stewart in the Caribbean Islands during this period. Petitioner testified that she "always went on vacation between Christmas and New Year's to the islands." The credit card slips and petitioner's testimony concerning her habit of vacationing in the islands between Christmas and New Year's Day, establishes a specific pattern of conduct from which her location could be determined on any particular day (*Matter of Kern*, Tax Appeals Tribunal, November 9, 1995; *Matter of Armel*, Tax Appeals Tribunal, August 17, 1995). These days are to be counted as non-New York days.

F. Petitioner introduced credible testimony and documents during the hearing that the daily itineraries and limousine invoices were not reliable tools in determining the location of Ms. Stewart on any given day. Ms. Stewart's actual activities could vary as to what was written on the itineraries and the limousine invoices generally indicated only where the driver went, but not who was or was not in the car. The claim made by petitioner that these records cannot be relied upon to place Ms. Stewart in New York on any given day is accepted. Although petitioner continues to rely on these same documents to establish her location outside the State,

such reliance must fail for the same reasons the documents cannot be used for a New York location. The auditor's schedule of days within and without New York State is to be adjusted to reflect the unreliability of the limousine invoices and the daily itineraries. Where the auditor relied on either of these two documents, or both, to record a day as outside New York State, that day is now to be considered an unknown day and therefore counted as a New York day. The auditor relied on the limousine invoices and the daily itineraries to determine that the following days were "Connecticut" or "other" days. These days are now to be considered New York days. The days total 31 and are as follows: January 20, 1992; February 3, 13, 26 and 28, 1992; March 10, 17 and 26, 1992; April 1, 23, 24 and 30, 1992; May 11, 20 and 22, 1992; June 2 and 16, 1992; July 6, 7, 9 and 10, 1992; September 12, 24 and 28, 1992; October 6 and 9, 1992; November 6, 18, 19 and 20, 1992 and December 3, 1992. The revised day count is as follows:

LOCATION	DAY COUNT
New York City	139
New York State	38
Connecticut	80
Other	14
Out of Country	25
Unknown	70
Total	366

G. The remaining issue then is whether petitioner spent in the aggregate more than 183 days of the taxable year in New York. It is concluded that petitioner has failed in her burden to prove that she did not (Tax Law § 689[e]; 20 NYCRR former 3000.10[d][4]).

In determining whether petitioner has met her burden of establishing that she spent fewer than 184 days in New York State during the year at issue, review was made of the

auditor's schedule, the documentation presented by petitioner and the testimony of petitioner and her witnesses. No handwritten diary or day-to-day records were introduced. Very little backup documentation of any kind, i.e., travel records or receipts, tickets, hotel receipts, credit card invoices were submitted to substantiate Ms. Stewart's testimony. While Margaret Christiansen, Susan Magrino and Gael Towey, business associates of Ms. Stewart, testified that she was only occasionally in New York and that when they wanted to reach Ms. Stewart, they telephoned her Connecticut home, this testimony was extremely general and shed no light on petitioner's whereabouts on specific days in 1992. The witnesses also testified that when telephoning Connecticut, Ms. Stewart was not always available and, on these occasions, they would leave a message on her answering machine. Mr. Kennedy, petitioner's limousine driver of choice, who was, besides Ms. Stewart, the person best able to describe Ms. Stewart's whereabouts, testified on direct examination that, although he could not specify where petitioner spent most of her time, i.e., Connecticut or New York, it was a mixture of the two. This is in contrast to petitioner's testimony that she was hardly ever in New York.

It is true that credible testimony can be sufficient to meet a taxpayer's burden to establish that she was not present in New York for more than 183 days (*Matter of Avildsen*, Tax Appeals Tribunal, May 19, 1994). It is also true that a taxpayer is not required to specifically account for her whereabouts on every day of the period in question *if* she can establish a "pattern of conduct" from which her location may be determined for any particular day (*Matter of Kern, supra*). However, the Tribunal has distinguished these cases from those where testimony alone is offered as proof of whereabouts. In *Matter of Miller* (Tax Appeals Tribunal, January 30, 1997), the Tribunal noted that in *Avildsen* and *Kern*,

“there was other proof of the whereabouts of the petitioners for specific days. The testimony concerning the petitioners’ pattern of conduct was used to fill in the gaps between days where the specific location of the petitioners was known.”

Based upon the documents in the record, the testimony and credibility of the witnesses and the lack of documentation in the record as to the days claimed to have been spent outside the State, it is clear that petitioner has failed to meet her burden of establishing that she spent fewer than 184 days in New York State during the year 1992.

H. Tax Law former § 631(a) provides that the New York source income of a nonresident individual “shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . , derived from or connected with New York sources” Tax Law former § 631(b)(1)(B) defines “income and deductions from New York sources” as “[i]tems of income, gain, loss and deduction derived from or connected with New York sources . . . attributable to a business, trade, profession or occupation carried on in this state.”

The Income Tax Regulations (20 NYCRR former 131.4[a][2]) provide that:

[a] business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for such taxpayer’s income or part thereof, such taxpayer is carrying on a business or occupation. . . .

The New York adjusted gross income of a nonresident is the income from a business trade, profession or occupation carried on in this state by the taxpayer, and not by the person paying for it (*Matter of Linsley v. Gallman*, 38 AD2d 367, 329 NYS 2d 486, *affd*, 33 NY2d 863, 352 NYS 2d 199). The Court of Appeals, in *Matter of Ausbrooks v. Chu* (66 NY2d 281, 496 NYS2d 969), provided the following guidance in addressing the issue of whether a business was being conducted in New York State when it stated that:

In determining whether an enterprise is carrying on business in New York State, . . . certain objective factors must be weighed, including: (1) whether the business is “systematically and regularly carried on” in New York (20 NYCRR 131.4[a][2]); [and] (2) whether activities within the State in connection with the business are conducted in this State with a “fair measure of permanency and continuity” (20 NYCRR 131.4[a][2]). . . . In sum, an enterprise is carrying on business in New York, for tax purposes, where there exists a reasonably systematic and continuous transactional nexus between this State and the enterprise.

I. Addressing first petitioner’s relationship with Kmart in 1991, it is found that the licensing fee, day rate and product royalties are not subject to taxation in New York State. At the time of the signing of the agreements and during the year at issue, Kmart was located in Michigan and Ms. Stewart resided in Connecticut. All services provided by Ms. Stewart to Kmart during 1991 were rendered at the corporate headquarters of Kmart located in Troy, Michigan or various other locations outside New York State. There is no evidence in the record that Ms. Stewart conducted any business relating to Kmart in New York State in 1991. Ms. Stewart’s business operation as it related to Kmart was not systematically and regularly carried on in New York nor was her Kmart business operation conducted in New York with any measure of permanency or continuity. As there did not exist a systematic and continuous transactional nexus between this State and Ms. Stewart’s Kmart business enterprise, it cannot be found that Ms. Stewart was carrying on a business in New York State with regard to Kmart

and any income earned from Kmart during 1991 is not subject to personal income tax. The same rationale is applicable to the year 1992 as it relates to Ms. Stewart's business enterprise with Kmart and New York City, and the income earned from Kmart during 1992 is not subject to the New York City earnings tax on nonresidents.

J. The same conclusion is reached as to the income earned by Ms. Stewart in 1991 from her contractual agreement with Crown Publishing to create two books: *Martha Stewart Gardening Book* and *New Old House*. At the time that this agreement was entered into, Crown Publishing was located in New York City. The layout work was done at Crown Publishing's offices in New York City and Ms. Stewart came to the offices to check on the layouts, according to Ms. Stewart, a total of four times during the publication of these two books. However, it is not where the layouts were done but where Ms. Stewart performed her contributions to the publications that is determinative of whether she had a business enterprise in New York (*see, Matter of Linsley v. Gallman, supra*). The subjects of each of these books, the garden and the renovated house, were situated in Connecticut. Ms. Stewart was intimately involved in the many aspects of these books, including the writing, planting of the garden, daily care of the garden, daily supervision of the house renovation and overseeing the photography of both the garden and the house. All of these activities took place in Connecticut, except for the few trips which Ms. Stewart took to Crown Publishing's offices to review the layouts. Ms. Stewart did not have any office or desk space in New York State or City relating to the publication of the two books, and most of the writing, editing and other "office" type work occurred in Connecticut at petitioner's home. Again, as there was no systematic and continuous transactional nexus between the State and Ms. Stewart's business enterprise relating to the work she performed on the two books, the royalties and the advances

she received from Crown Publishing in 1991 are not subject to personal income tax. In addition, Ms. Stewart's income earned from Crown Publishing in 1992 is not subject to the New York City earnings tax on nonresidents.

K. The next area of inquiry involves the contractual relationship between Ms. Stewart and Time, and later TPV. The agreement centered around the publication of the national magazine entitled Martha Stewart Living. Time and TPV were both situated in New York City at the time of the signing of the agreements. Petitioner was provided with office space located in the Time Life Building in New York City. Under the agreements, Ms. Stewart worked closely with the editor to provide general creative and editorial direction with respect to the two test issues and, later, to the regularly published issues. The editor, art director and staff were all located in New York City. Petitioner worked with the editor in developing an editorial budget for each issue of the magazine and presented that budget to the publisher, located in New York City. Ms. Stewart was also present at most of the photography shoots, which took place both within and without New York, and reviewed the layouts for the magazines at the New York City office as well as her home in Connecticut. Although petitioner did most of her writing and editing at her home in Connecticut, her responsibilities, her participation in most of the aspects of the magazine and the location of the editor, art director, staff and publisher of the magazine in New York City lead to a conclusion that Ms. Stewart regularly participated in meetings and discussions at the offices of Time and TPV. Thus, in terms of Ms. Stewart's business dealings with Time and TPV in 1991, there appears to be a reasonably systematic and continuous nexus between this State and Ms. Stewart so as to consider her business enterprise with Time and TPV to be carried on in New York (*see, Matter of Ausbrooks v. Chu, supra*; 20 NYCRR former 131.4[a][2]). For these reasons,

income earned by Ms. Stewart from Time and TPV during 1992 is subject to the New York City earnings tax on nonresidents.

L. As the income denoted as “Lecture Income” arose from lectures occurring outside New York State, no portion of this income is subject to New York State or City taxation.

M. With regard to income earned from television appearances, petitioner emphatically denied that she was on the Today Show in 1991. This assertion was directly contradicted by the July/August 1991 and September/October 1991 issues of Martha Stewart Living magazine which state that she was appearing on the Today Show during that year. Although later recanted in her brief, this is another example of the lack of credible testimony to support petitioner and the difficulty inherent in relying solely upon an individual’s memory in attempting to establish facts alleged to have occurred seven years ago. Petitioner subsequently claimed that certain of the Today Show segments were taped in Connecticut, especially the Thanksgiving and Christmas shows. However, no documentation was presented to establish these out-of-state tapings, and therefore all income earned from television appearances during 1991 are subject to New York State and City income tax. Finally, no information was provided at hearing with respect to the income earned in 1991 and designated as being from the “Newsletter,” “video sales” and as “expense reimbursements.” Therefore, these amounts must be presumed to be New York State and City income taxable to a nonresident (*see*, Tax Law § 689[e]; *Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398).

N. Penalties were asserted pursuant to Tax Law § 685(b), (i) and (p) for negligently failing to retain the necessary records with regard to income allocation and residency issues, failing to file final Federal audit changes and the substantial understatement of petitioner’s tax

liability, respectively. Petitioner has the burden to establish that these penalty assessments were erroneous (Tax Law § 689[e]; ***Matter of Erdman***, Tax Appeals Tribunal, April 6, 1995).

Petitioner claims that her failure to maintain records documenting her whereabouts during the years at issue, failure to maintain records relating to her income allocation and her failure to report the Federal audit changes to the Division were a result of her reliance upon her previous representatives to advise her of her tax obligations, and their failure to do so.

Unfortunately, a mistake made by a tax preparer, no matter how inadvertent, is not the same as reasonable cause. More importantly, petitioner has put forth no facts regarding her involvement in the decision not to maintain records or the failure to report the final Federal audit changes.

Reliance on the advice of a tax professional does not necessarily constitute reasonable cause (*see, Matter of LT & B Realty v. State Tax Commn.*, 141 AD2d 185, 535 NYS2d 121; ***Matter of Etheredge***, Tax Appeals Tribunal, July 26, 1990). To justify a finding of reasonable cause, petitioner must show that the reliance itself was reasonable (*see, Matter of Norwest Bank International*, Tax Appeals Tribunal, May 3, 1990). Here, the facts are so sparse that it cannot be determined whether petitioner made any effort to determine her New York State tax liability. There is no evidence that she did anything or on what advice she relied. Consequently, there is no evidence that she reasonably relied on her accountants' advice in failing to maintain the proper records or report the Federal changes.

The alternative proposition which petitioner appears to urge is that a mistake by a tax professional is, in itself, a basis for canceling penalty. She seems to argue that delegating the preparation of tax returns or aspects relating to tax returns to a tax professional should serve to insulate a taxpayer from penalties, if the professional makes the error, or omission. Common sense says that this cannot be right, and there is no legal authority to support this proposition. If

having one's return prepared by a tax preparer effectively insulated a taxpayer from penalties, "who would not seek the advice of a sympathetic tax expert" (*Matter of LT & B Realty v. State Tax Commn., supra*, 535 NYS2d, at 123).

O. The petition of Martha Stewart is granted to the extent indicated in Conclusions of Law "I", "J" and "L"; in all other respects the petition is denied. The Notice of Deficiency dated October 6, 1997, as modified herein, is sustained.

DATED: Troy, New York
January 13, 2000

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE